THE PHYSICIAN AS AN EXPERT

EXPERT evidence is evidence of a scientific or technical character in regard to a matter that is outside the domain of ordinary experience and knowledge. The evidence is usually in the form of opinions or conclusions based upon facts that for the purposes of an opinion are assumed to be true, although it may be in regard to scientific facts. The expert is one who has had special training or opportunities in a particular subject that the ordinary witness has not enjoyed, and who has thereby acquired certain habits of judgment that render his explanations and opinions in the field of his specialty valuable as guides and worthy of consideration.[1]

It is by virtue of an exception to a fundamental rule of evidence that the opinions of experts are received, the rule being that witnesses must state facts and not conclusions that they draw from facts. Ordinarily it is the province of the jury to consider the facts in the case and, uninfluenced by the opinions of witnesses, draw such inferences therefrom as their judgment may dictate. But in cases involving questions outside of the ordinary range of inquiry, in which correct conclusions can be drawn from the facts only by means of scientific deductions, it is apparent that most jurors would be unable to perform the functions that the law imposes upon them, unless aided in their deliberations by the judgment and opinions of witnesses skilled and experienced in the subject under investigation. And so, while the law does not look with favor upon the

[1] See Dole *v.* Johnson, 50 N. H. 452; Jones *v.* Tucker, 41 N. H. 546. In this case the court speaking through Judge Doe says:—"Experts may give their opinions upon questions of science, skill or trade, or others of the like kind, or when the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, or when it so far partakes of the nature of a science as to require a course of previous habit or study, in order to the attainment of a knowledge of it; and the opinions of experts are not admissible when the inquiry is into a subject-matter, the nature of which is not such as to require any peculiar habits or study in order to qualify a man to understand it." Struthers *v.* The Philadelphia and Delaware County Railroad Company, 174 Pa. St. 291. In this case the court defines an expert as follows:—"An expert is a person experienced, trained, skilled in some particular business or subject. An expert witness is one who, because of the possession of knowledge not within ordinary reach, is specially qualified to speak upon the subject to which his attention is called." In Heald *v.* Thing, 45 Me. 392, 394, an expert is defined as being "a skillful or experienced person; a person having skill, experience or peculiar knowledge on certain subjects or in certain professions: a scientific witness."

giving of opinions or conclusions by witnesses, it permits it in certain cases, where it is apparent that such a course is necessary to the proper administration of justice. "The general rule undoubtedly is," says the supreme court of the United States, "that witnesses are restricted to proof of facts within their personal knowledge, and may not express their opinion or judgment as to matters which the jury or the court are required to determine, or which must constitute elements in such determination. To this rule there is a well established exception in the case of witnesses having special knowledge or skill in the business, art, or science, the principles of which are involved in the issue to be tried."[1] The testimony of the expert is admitted upon the theory that in the particular case the issue is such that the jurors are not competent to draw their own conclusions from the facts without his aid. The purpose of his testimony is to inform the jurors as to the significance of the facts involved in the inquiry, and thus to aid them in reaching correct conclusions.[2] The opinions of the expert should

[1] Conn. Mut. Life Ins. Co. *v.* Lathrop, 111 U. S. 612, 618.

[2] In Muldowney *v.* Illinois Central Ry. Co., 36 Iowa, 462, 473, the court gives the following as a governing rule: "that the opinion of witnesses possessing peculiar skill is admissible, whenever the subject of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance; in other words, when it so far partakes of the nature of a science as to require a course of previous habit or study, in order to the attainment of a knowledge of it; and that the opinions of witnesses cannot be received when the inquiry is into a subject-matter the nature of which is not such as to require any peculiar habits or study, in order to qualify a man to understand it." See, also, Hamilton *v.* Des Moines Valley R. R. Co., 36 Iowa, 31, 36. Upon this subject the supreme court of Pennsylvania uses the following language: "In the examination of experts it is only necessary to keep constantly in view that their proper office is to instruct the court and jury in matters so far removed from the ordinary pursuits of life that accurate knowledge of them can only be acquired by continued study and experience; the purpose is to enable both court and jury to judge intelligently of the force and application of the facts introduced in evidence, as they would have been able to do if they had been persons properly instructed upon the subjects involved." Coyle *v.* Commonwealth, 104 Penn. St. 117, 131. The design of expert testimony, according to the supreme court of Massachusetts, is "to aid the judgment of the jury in regard to the influence and effect of certain facts which lie out of the observation and experience of persons in general." Commonwealth *v.* Rogers, 7 Met. (Mass.) 500, 505. See further upon the subject: Milwaukee, etc. R. Co. *v.* Kellogg, 94 U. S. 469, 472, 473; St. Louis, etc.. R. Co. *v.* Farr, 12 U. S. App. 520; Grigsby *v.* Clear Lake Water Works Co., 40 Cal. 396, 405; Indiana, Bloomington and Western R'y Co. *v.* Hale, 93 Ind. 79, 81; City of Parsons *v.* Lindsay, 26 Kans. 426, 432; Snow *v.* Boston & Me. R. R., 65 Me. 230; Page *v.* Parker, 40 N. H. 47, 59; Koccis *v.* State, 56 N. J. Law, 44. The supreme court of Connecticut holds that the true test as to the admissibility of expert testimony, "is not whether the subject-matter is common or uncommon, or whether many persons or few have some knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinion founded on such knowledge or experience any aid to the court or the jury in determining the questions at issue." Taylor *v.* The Town of Monroe, 43 Conn. 36, 43.

be considered by the jury as facts, for they are essentially conclusions of fact to which his knowledge, observation and judgment have led him.

The functions of the expert are in a sense judicial and should be so regarded by him. He is called into the case, in theory at least, not as a partisan or advocate, but to aid the jury by his opinions in reaching correct results. The fact that the jury are not bound to be governed by what he says, in no way relieves him of responsibility or changes his relation to the controversy. Although a witness whose testimony is to be considered by the jury like that of any other witness, he should always maintain the judicial attitude. The frequent failure of the expert to do this is undoubtedly the cause of much of the unfavorable comment from the bench in regard to this class of testimony, and has served perhaps more than anything else to bring the expert witness into disrepute. It is apparent that the bias of experts prompted the following from the supreme court of Michigan: "An examination of the record discloses that this woman was convicted upon the evidence of medical experts,—upon the opinions of men who never saw William Vanderhoof while he was alive. It is also apparent, with one or two exceptions, that these experts were biased against the respondent, and used their learning and ability, it is to be hoped unconsciously, to forward and aid the cause of the prosecution. This case illustrates most forcibly the dangerous character of expert testimony, which has so often been called to the attention of the courts and challenged by them."[1] This same court in another case suggests that in all important litigations, where expert testimony is proper, the experts are to be found arrayed against each other.[2] In speaking of experts the supreme court of California suggests that they "should be selected by the court and should be impartial as well as learned and skillful . . . . . It must be painfully evident to every practitioner," continues the court, "that these witnesses are generally but adroit advocates of the theory upon which the party calling them relies, rather than impartial experts upon whose superior judgment and learning the jury can safely rely. Even men of the highest character and integrity are apt to be prejudiced in favor

[1] People *v.* Vanderhoof, 71 Mich. 158, 167, 168.

[2] Beaubien *v.* Cicotte, 12 Mich. 459, 502, In the later case of Prentiss *v.* Bates, 88 Mich. 567, 592, the court says that, "it must not be forgotten that in all cases of importance it is the unfortunate fact that we find these experts arrayed against each other."

of the party by whom they are employed. And, as a matter of course, no expert is called until the party calling him is assured that his opinion will be favorable."[1] "The unsatisfactory nature of such evidence," says the supreme court of Wisconsin, "is well known. The facility with which great numbers of witnesses may be marshalled on both sides of such a question, all calling themselves experts, and each anxious to display his skill and ingenuity in detecting the false or pointing out the true, and equally honest and confident that his own theory or opinion is the correct one, and yet all on one side directly opposing all on the other, admonishes us of the fallibility of such testimony, and of the great degree of allowance with which it must be received."[2] "All persons who have had much experience in jury trials," says LAWRENCE, J., of the supreme court of Illinois, "must have noticed how apt are witnesses called as experts, to speak with great confidence, when seeking to ascertain the unknown cause of certain effects by appearances which to others convey little meaning. Such evidence is often valuable, but as it relates to matters of theory and opinion merely, it is entitled to less weight when the witnesses are so circumstanced that they have a strong interest in propounding one opinion or theory rather than another."[3] "My own experience," says Mr. Justice MILLER, "both in the local courts and in the supreme court of the United States, is that, whenever the matter in contest involves an immense sum in value, and where the question turns mainly upon opinions of experts, there is no difficulty in introducing any amount of them on either side."[4]

This class of testimony must always be subject to criticisms like the foregoing, and can never occupy the place or exert the influence that its real importance demands, so long as the expert persists so frequently in taking the part of an advocate instead of exercising the quasi-judicial function that the law imposes. To command the respect that his position as an authority should bring to him, the expert must become in practice what he is in theory, an aid to the court and jury in the interpretation of facts and the discovery of truth without regard to the effect that his testimony may

[1] Grigsby *v.* Clear Lake Water Co., 40 Cal. 396, 405.

[2] Daniels *v.* Foster, 26 Wis. 686, 693.

[3] Chicrgo & Alton R. R. Co. *v.* Shannon, 43 Ill. 338, 343, 344.

[4] Middlings Purifier Company *v.* Christian, 4 Dillon 448, 459.

have upon the interests of either party to the controversy. So long as the present method of selecting and paying experts continues, but little change for the better can probably be expected. The change will undoubtedly come when the expert is appointed and paid as an officer of the court and is by law made a part of the judicial machinery of the state.

But even under the changed conditions suggested, the testimony of the expert would not probably, in all cases, receive the consideration that should be given to it. Usually expert testimony is in the form of a personal opinion or judgment in regard to the significance of a given state of facts. When of this character, its very nature is such as to excite doubt and invite criticism; its inherent qualities are such as tend to defeat the object for which it is introduced. The ordinary juror, knowing that he is not bound by the testimony, is inclined to reject it altogether. There is certainly force in the suggestion that it is "the inherent vice of an opinion that it can never be conclusive, but is wholly at the mercy of the jury to accept or reject as they please."[1] Furthermore the testimony of the expert, and particularly of the medical expert, must always suffer somewhat from the fact that there is inevitably more or less conflict in opinion by reason of the changes that modern research is developing. A radical change in theory can never meet with universal approval. Among experts we will always have the conservative and the advanced. The conflict between the old and the new must always introduce an element of confusion and uncertainty.

But notwithstanding the criticisms upon expert testimony and the fact that there are in it inherent weaknesses, and notwithstanding the uncertainty as to its practical value by reason of the unknown attitude of the jury, in many cases, and particularly in those involving medical questions, a resort to it is absolutely necessary. The law governing the testimony of the physician as an expert is of large practical importance to both legal and medical professions.

Before expert testimony can be introduced, certain preliminary questions must be settled by the court. It must be determined first whether the subject-matter of the inquiry lies within the field of the expert. And if this is found to be the case, the court must then determine as to the qualifications of the person who is offered

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[1] American Law Register (New Series), vol. 32, p. 531.

as an expert.[1] This is done by means of a preliminary inquiry, usually in the form of an examination and cross-examination by the counsel of the respective parties, conducted on the one side with a view of showing to the court the competency of the party offered and on the other with a view of showing limitations in learning or experience or both of such a nature as should lead the court to reject the party as an expert.[2] The ruling of the trial court upon this question of competency to testify as an expert is generally regarded as conclusive and not subject to review, unless it clearly appears that there has been an abuse of discretion.[3]

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[1] "When a witness is offered as an expert," says the court in Jones *v.* Tucker, 41 N. H. 546, 547, "three questions necessarily arise: 1. Is the subject concerning which he is to testify, one upon which the opinion of an expert can be received? 2. What are the qualifications necessary to entitle a witness to testify as an expert? 3. Has the witness those qualifications? . . . The rule determining the subjects upon which experts may testify and the rule prescribing the qualifications of experts are matters of law, but whether a witness offered as an expert has those qualifications, is a question of fact to be decided by the court at the trial." The opinion of the witness himself as to his qualifications as an expert is entirely immaterial. See Boardman *v.* Woodman, 47 N. H. 120, 135; Gates *v.* Chicago & Alton R. Co., 44 Mo. App. 488, 492.

[2] It should be noted that the practice in regard to this preliminary examination is not uniform. While that suggested above seems to be logical and proper and is, perhaps, generally followed, it is the practice of some courts not to allow a preliminary cross-examination but to give the opposing counsel the opportunity to test the competency of the witness when he cross-examines upon the merits. See Sarle *v.* Arnold, 7 R. I. 582; City of Fort Wayne *v.* Coombs, 107 Ind. 75, 85; Drew *v.* Beall, 62 Ill. 164, 166. Upon this subject the supreme court of Minnesota uses the following language: "Whether a witness is qualified to give an opinion is to be decided by the court, as a question of fact, before the witness shall be permitted to state his opinion. It would seem, logically, that, before deciding it, all the evidence bearing on the question, whether brought out by direct or cross-examination, should be taken. That would certainly be so if the decision permitting the opinion to be given were final and conclusive that the witness is qualified, so that the jury are bound to take the opinion as that of an expert. The general practice is for the opposing party to exercise his right of cross-examination on the matter of qualification after the witness has been examined in full by the party offering him. That is the more convenient practice. And we think it is the understanding of the judges and the bar that while the court may, in its discretion, permit a preliminary cross-examination, it is not bound to do so, but may allow the opinion to be given, when the direct examination shows *prima facie* that the witness is qualified." Finch *v.* Chicago, Milwaukee & St. Paul R. Co., 46 Minn. 250, 252, 253.

[3] Stillwell Mfg. Co. *v.* Phelps, 130 U. S. 520, 527; Howland *v.* Oakland Consol, St. R. Co. 110 Cal. 513, 42 Pac. Rep. 983; Dole *v.* Johnson, 50 N. H. 452; Insurance Co. *v.* Ross Lewin, 24 Col. 43, 65 Am. St. Rep. 215, 51 Pac. Rep. 488; Sorg *v.* First German Congregation, 63 Pa. St. 156, 161; Stevenson *v.* Ebervale Coal Co., 203 Pa. St. 316, 330, 331; Eureka Block Coal Co. *v.* Wells, 29 Ind. App. 1, 94 Am. St. Rep. 259; City of Fort Wayne *v.* Coombs, 107 Ind. 75; State *v.* Cole, 94 N. C. 958; Fayette *v.* Chesterville, 77 Me. 28; Perkins. *v* Stickney, 132 Mass. 217; Schmuck *v.* Hill (Neb.), 96 N. W. Rep. 158: Greenleaf on Evidence (16th ed.), § 430 f. and note in which numerous cases are cited.

Although not often done, there is no objection to the calling of witnesses other than the expert offered, for the purpose of showing the qualifications of the expert. "Any evidence," says the supreme court of Iowa, "tending to show that the witness called as an expert possesses the requisite knowledge and skill, is, we think, admissible for what it is worth."[1] After the court has determined that a witness is competent to testify as an expert, it is proper for the attorneys of both parties in the examination and cross-examination upon the merits to ask further questions as to competency with a view of aiding the jury in determining as to the weight to be given to the evidence.[2] If it happen that a proper foundation for expert evidence has not been laid, the error will be cured, if, subsequently, upon cross-examination, the competency of the witness appear.[3] This preliminary question as to competency is one that must be determined by the court upon evidence submitted, like any other issue of fact. The personal knowledge of the presiding judge cannot take the place of evidence; nor can the court properly waive the trial of the question on the ground that the same witness on a former trial between other parties was permitted to testify to the same matter. The "issue is to be tried and determined the same as if the witness in question had never before been used as an expert and the same as if the evidence given in court on the trial of that issue gave the members of the court all the personal knowledge they have of his qualifications as an expert.[4]

This preliminary question of competency is easy of solution when the witness offered is a physician or surgeon who has come into the profession through the regular channels, for it is the generally recognized practice to permit any medical man who has been legally licensed, to testify as an expert in regard to any matter that lies properly within the field of his profession. The fact that he has been duly licensed to practice appearing, the court will at once pronounce him qualified to speak as an expert. The question of competency is settled when the regularity of the license of the witness has been shown to the satisfaction of the trial judge.[5] But it

[1] See State *v.* Maynes, 61 Iowa 119, 120; Mason *v.* Phelps, 48 Mich. 126, 132; Mendum *v.* Commonwealth, 6 Rand. (Va.) 704.

[2] Andre *v.* Hardin, 32 Mich, 324.

[3] Crich *v.* Williamsburg City Fire Insurance Co., 45 Minn. 441, 443, 48 N. W. 198.

[4] Fire Association of Philadelphia *v.* Merchants' National Bank of St. Johnsbury, 52 Vt. 83, 85. See, also, Polk *v.* The State, 36 Ark. 117, 123.

[5] Hathaway *v.* National Life Ins. Co., 48 Vt. 335, 351; Siebert *v.* People, 143 Ill. 571, 579; Seckinger *v.* Mfg. Co., 129 Mo. 590, 606; Hardiman *v.* Brown, 162 Mass. 585; Olmsted *v.* Gere, 100 Pa. St. 127; Livingston *v.* The Commonwealth, 14 Gratt. 592.

should be noted that the extent of the knowledge, experience and skill of the witness may be subsequently tested upon cross-examination, not for the purpose of raising the question of competency, but with a view of discrediting his testimony with the jury.[1] The law does not recognize any one school of medicine to the exclusion of others,[2] therefore in proving the qualifications of the medical expert, it is not necessary to show that he has been educated according to the principles of any particular school. If it appear that he has been duly authorized to practice medicine according to the principles of any one of the recognized schools or systems, the qualification will be regarded by the court as sufficient.

Where the person offered as a medical expert is not a regular practitioner, duly licensed, the question of his competency may be one of some difficulty. According to some authorities, it is not absolutely necessary to his competency that he should be a physician or that he should have studied for the profession. It has been held, for example, that a hospital nurse of twenty-one years of experience in general hospital work, including attendance upon the surgical operations in the hospital, performed upon men, is competent to testify for what disease an operation which he witnessed was performed.[3] The supreme court of California has held that a Roman Catholic priest, under the circumstances disclosed in the case, might properly testify as an expert concerning the mental condition of a party. It appeared in evidence that it had been a part of the priest's preliminary education to become fitted to pass upon the mental condition of persons seeking the sacraments of the church, and that for years he had been constantly exercising that duty. In speaking of this witness and his qualifications, the court said: "It was a part of his collegiate education, and it was especially a matter of daily practice with him for ten years to familiarize himself with the mental condition of persons upon whom he was called to attend in his character as a priest; and it does seem to us that, from both education and experience, he was peculiarly qualified to express an opinion, as an expert, on the question of mental

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[1] Challis *v.* Lake, 71 N. H. 90, 94.

[2] Corsi *v.* Maretzek, 4 E. D. Smith (N. Y.) 1; White *v.* Carroll, 42 N. Y. 161; Bowman *v.* Woods, 1. Greene (Iowa), 441.

[3] Lund *v.* Masonic Ass'n. of Western New York, 88 N. Y. Sup. C't R. 287, 30 N. Y. Supp. 775.

diseases."[1] It has been held that a medical student who has pursued his studies for some time under the direction of a practitioner, practiced under his direction and in his company, and who thereafter studied medicine in a university and while there saw and treated at the hospital many cases of the disease in question, is competent to testify as an expert that a party was suffering from the particular disease.[2] It has been held that a woman who has had experience as a nurse in childbirth, but who has not read medicine and has no knowledge upon the subject excepting what she has gained from her experience as nurse, may give expert testimony as to whether the birth of a child was premature. "The witness," says the court, "by her experience and observation, appears to have acquired knowledge of the subjects about which she was testifying that persons generally do not have. To the extent of this particular knowledge, she was a person of skill and science, and her opinion, founded upon it, was evidence competent to go to the jury."[3] In the case cited below it appeared that the party offered as a medical expert was not a graduate of a medical college and had no license to practice, but that he was actually in practice, that he had attended one course of medical lectures, and had studied the science three years before he began his practice. The supreme court held the ruling of the trial court admitting the witness as a medical expert to be correct.[4] It is probably the law at the present time, in the absence of some statute changing it, that graduation from a recognized medical college and possession of a license to practice are not necessary qualifications for the

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[1] Estate of Toomes, 54 Cal. 509. See also, Commonwealth *v.* Wireback, 190 Pa. St. 138, 42 Atl. Rep. 542.

[2] State *v.* Dixon, 47 La. Ann. 1. "It is true," said the court in this case that "the witness had not as yet received a diploma or been licensed to practice medicine, but while this fact would be important for certain purposes, it would not of itself disqualify the witness necessarily. A person other than a licensed physician (for instance, trained nurses in the charity hospital), may have such knowledge of a particular disease as to make their statements regarding its existence and its stage and state of progress thoroughly reliable."

[3] Mason *v.* Fuller, 45 Vt. 29. But see Osborne *v.* Troup, 60 Conn. 485, where a nurse was held not competent to testify as an expert on account of lack of education in medicine and training as a nurse and for the further reason that her knowledge in regard to the matter in issue was only that which any person of ordinary intelligence might, under similar circumstances, have had. See, also Allen *v.* Voje, 114 Wis. 1, 13.

[4] New Orleans, etc. R. Co. *v.* Allbritton, 38 Miss. 242, 75 Am. Dec. 98.

medical expert.[1] The New York court of appeals, as is evident from the following quotation, regards this as the law: "After a careful consideration of the subject," says the court, "we have reached the conclusion that if a man be in reality an expert upon any given subject belonging to the domain of medicine, his opinion may be received by the court, although he has not a license to practice medicine. But such testimony should be received with great caution, and only after the trial court has become fully satisfied that upon the subject as to which the witness is called for the purpose of giving an opinion, he is fully competent to speak."[2] It goes without saying that expert testimony from medical witnesses of this class would ordinarily have less weight with the jury than the same kind of testimony from regularly licensed practitioners. In Wisconsin the matter has been the subject of legislative enactment, and it is provided that "no person practicing physic or surgery, or both, shall have the right . . . . to testify in a professional capacity as a physician or surgeon in any case unless he," before a date named, shall have "received a diploma from some incorporated medical society or college, or shall, since said date, have received a license from the state board of medical examiners."[3] The wisdom of this legislation is apparent. It does away with the danger of too great liberality by trial courts in admitting opinion evidence by a class of witnesses whose preparation to give opinions may be open to serious question, and whose testimony, according to the foregoing quotation from the New York court of appeals, should always be received with great caution.

In order that a party may be competent to testify as a medical expert, it is not necessary that he should, at the time he is called, be in the active practice of his profession. The fact that he is not in full practice does not bear upon the question of qualification, but is

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[1] New Orleans, etc. R. Co. *v.* Allbritton, 38 Miss. 242, 75 Am. Dec. 98; State *v.* Speaks, 94 N. C. 865; State *v.* Merriman, 34 S. C. 16, 36, 12 S. E. Rep. 619, 626; Tullis *v.* Kidd, 12 Ala. 648; Stone *v.* Moore, 83 Iowa, 186, 49 N. W. Rep. 76; People *v.* Rice. 159 N. Y. 400, 410.

[2] People *v.* Rice, 159 N. Y. 400, 410.

[3] Wisconsin Statutes, 1898, Vol. 1, Sec. 1436. It has been held that this statute applies only in cases where physicians or surgeons are called upon to testify *as experts*. Montgomery *v.* The Town of Scott, 34 Wis. 338. The conpetency of a witness under this statute may be proved by his own oral testimony without the production of his diploma or of record evidence of the incorporation of the college or society which granted it. McDonald *v.* The City of Ashland, 78 Wis. 251. See also, Rider *v.* Ashland County, 87 Wis. 160, 164, and Allen *v.* Voje, 114 Wis. 1, where this statute is considered.

rather a matter for the consideration of the jury in determining what weight should be given to the opinion of the witness.[1] But it should be noted that the supreme court of Vermont has suggested that the mere fact that a person is by education a physician would not, in the absence of any practice of the profession by him, be deemed a sufficient qualification to justify his admission as an expert.[2]

It is quite generally held that the competency of the physician to testify as an expert does not depend upon the fact of his having seen or treated in his practice a case similar to the one under investigation. He may be competent even though his knowledge has been gained entirely from books. For example, it has been held by the supreme court of Massachusetts that a practicing physician in good standing and of long experience, who knows what the authorities say in regard to tumors, may properly testify as to a tumor of the brain being the exciting cause of the sickness of a patient, although in his practice he has not met with tumors on the brain, and does not pretend to understand the cause of tumors. "A doctor of medicine," says this court, "may be competent to express an opinion upon the effect of pressure at the base of the brain, whether it arises from tumors or other causes, although he may never have been called to a case where tumors were known to exist there; and in determining the qualifications of a physician, the extent of his reading in his profession may be considered, as well as his experience."[3] The supreme court of Colorado held it to be error for a trial court to reject as an expert, in a case involving poisoning by cyanide of potassium, a regularly licensed physician of large experience who had made toxicology a special study for years, and who had been a lecturer and teacher in the subject, because of lack of experience with poisoning of this kind.[4] In discussing this question, the supreme court of North Carolina held that a practicing physician might properly give his opinion as an expert, although it appeared not only that a like case had not fallen under his observa-

[1] Roberts *v.* Johnson, 58 N. Y. 613; Stone *v.* Moore, 83 Iowa, 186, 49 N. W. Rep. 76. In this case a woman doctor who had attended a regular medical school and practiced medicine in the regular way for a few years, but who had abandoned regular practice, and adopted the so-called "Christian Science" as a method of healing, was held competent to testify as an expert as to the result of her examination of the plaintiff and as to the symptoms of which plaintiff complained. See, also, Tullis *v.* Kidd, 12 Ala. 648.

[2] Fairchild *v.* Bascomb, 35 Vt. 398, 409, 410.

[3] Hardiman *v.* Brown, 162 Mass. 585.

[4] Insurance Co. *v.* Ross Lewin, 24 Col. 43, 65 Am. St. Rep. 215, 51 Pac. Rep. 488.

tion, but also that he had never read of such a case. "It is the province of science," said the court, "to discover general principles from long and accurate observation and sound reasoning; and it must be sufficient to induce courts of justic to receive assistance from men of science in making their investigations when assured by them that the principles of their science, applicable to a particular subject of inquiry, establish certain results, even though the witness may not have seen or read of a case in all its particulars like that under consideration."[1] The cases cited in the note will be found to support the general proposition that practical experience is not a necessary qualification for the medical expert.[2] It should however, be noted that in some jurisdictions the contrary opinion seems to prevail. For example, the supreme court of Wisconsin has held that a physician in general practice, whose knowledge of arsenical poisoning has been gained wholly from the reading of scientific works and from instruction received while a student of medicine, cannot properly testify as an expert as to the symptoms of such poisoning. The conclusion of the court is apparently based upon the proposition that a witness whose knowledge has been gained in this way would in his testimony simply repeat what he has read or been told. "The testimony of such medical witnesses," says the court, "is at best merely hearsay,—what medical books and teachers taught or told them, repeated from memory."[3] A physician who had been in practice for several years, but who had had no experience as to the effect upon health that comes from the breathing of illuminating gas, was held by the Massachusetts supreme court not qualified to speak as an expert upon the subject. The mere fact that the witness "was a physician," said the court, "would not prove that he had any knowledge of gas without further proof as to his experience; for it is notorious that many persons practice medicine who are without learning; and a physician may have much

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[1] State *v.* Clark, 12 Ired. Law, 151, 155, 156.

[2] Hathaway *v.* National Life Ins. Co. 48 Vt. 335; Johnson *v.* Castle, 63 Vt. 452, 21 Atl. Rep. 534; Siebert *v.* People, 143 Ill. 571; Healy *v.* Visalia & T. R. Co. 101 Cal. 585, 36 Pac. Rep. 125; City of Jackson *v.* Boone, 93 Ga. 662, 20 S. E. Rep. 46; State *v.* Terrell, 12 Rich. Law (S. C.) 321; Castner *v.* Sliker, 33 N. J. Law, 95, 507; Brown *v.* Marshall, 47 Mich. 576; Marshall *v.* Brown, 50 Mich. 148; Kelly *v.* United States, 27 Fed. Rep. 616; Taylor *v.* Grand Trunk R. R. Co. 48 N. H. 304; State *v.* Wood, 53 N. H. 484; People *v.* Phelan, 123 Cal. 551.

[3] Soquet *v.* The State, 72 Wis. 659, in which Boyle *v.* The State, 57 Wis. 472 is cited and followed.

professional learning without being acquainted with the properties of gas, or its effect on health."[1] It should be observed, however, that the same court in a subsequent case reaches the conclusion that a physician, whose general competency as an expert is not questioned, may give expert testimony as to the effect of inhaling gas, although it appears that he has not had experience with this kind of asphyxiation. "Although it might not be admissible," says the court, "merely to repeat what a witness had read in a book not itself admissible, still, when one who is competent on the general subject accepts from his reading as probably true a matter of detail which he has not verified, the fact gains an authority which it would not have had from the printed page alone, and, subject perhaps to the exercise of some discretion, may be admitted."[2] It has been held by the supreme court of Mississippi that a physician will not be qualified to speak as an expert where upon the preliminary inquiry a license to practice and a large general experience are shown, if it also appears that he has never made a study of the subject in regard to which he is called to testify and further that he has had no practical experience in connection with the subject. "The asking of hypothetical questions," says the court, "upon a presumed state of facts, for the purpose of eliciting the opinion of a witness, can be justified only upon the theory that the witness is so familiar with the general characteristics of the subject under discussion as to be able to form opinions worthy of consideration, even though wholly ignorant of the particular transaction in controversy. . . . . It is essential that the witness should be, or profess to be, an expert in the general subject under discussion. No acquaintance with cognate pursuits will suffice, unless the matter inquired about is common to both professions." The question under investigation in this case was one of mental competency, and the physician called as an expert expressly disclaimed being an expert in mental diseases, and said that "he had not made such diseases the subject of special study." His medical practice had apparently been confined to the treatment of such diseases as ordinarily fall within the range of a country practice.[3] In a recent case arising in Texas, a practicing

[1] Emerson *v.* Lowell Gas Light Co., 6 Allen 146.

[2] Finnegan *v.* Fall River Gas Co., 159 Mass 311.

[3] Russell *v.* State, 53 Miss. 367. See also Commonwealth *v.* Rich, 14 Grav 335.

physician in good standing and of large experience was called as an expert to testify as to the effects upon the human system of a shock from electricity. Upon the preliminary examination as to competency, it appeared that the physician had read the best authorities upon the subject and knew what they said, but at the same time he said that he was not an expert upon the subject and did not feel qualified to give an opinion. A ruling of the trial court holding him not qualified to speak as an expert was sustained. "When a witness," says the court, "states that he knows nothing about the subject of inquiry, and that he is not qualified to give an opinion, he should not be permitted to express any; for in order to say something concerning a matter, the witness should know something. . . . . In the case before us the witness had had no experience, and did not consider himself either an expert or qualified to give an opinion. He only knew what the books said upon the subject. It was not sought to be shown that he had formed an opinion from the books, or, if he had, what such opinion was. While an expert may testify to an opinion of his own derived from books, for one to do so, he must be an *expert*, and have an opinion of *his own* upon the subject of inquiry. . . . Books of science and art are not admissible in evidence to prove the opinions contained therein. . . . . If they are not, how can one who knows their contents but has formed no opinion of his own upon the subject under consideration, be allowed to testify to what the books say."[1]

The weight of authority is undoubtedly in favor of the rule that the medical witness, if a regularly licensed physician, may testify as an expert upon a subject within the limits of his profession, in regard to which he has had no professional experience and in regard to which his knowledge has been derived wholly from books, provided his knowledge is such as to enable him to form an independent opinion.[2] The rule follows logically from the doctrine that a license to practice authorizes the medical witness to speak as an expert. It without doubt frequently results in injustice. But it is a natural part of what may be called an expert testimony scheme to which the profession for the present seems to be committed, a scheme that unfortunately casts upon jurors the chief burden of responsibility.

[To be continued]

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[1] Wehner & White *v.* Lagerfelt, 27 Texas Civ. App. 520.

[2] See cases cited in note 2. p. 612.